BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEWELL J. McKINNEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 184,281
THE BOEING CO - WICHITA	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the Award entered by Administrative Law Judge John D. Clark dated February 26, 1996. The Appeals Board heard oral argument July 2, 1996.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Christopher J. McCurdy of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 9 percent whole body functional impairment rating. Claimant contends she has established a work disability. The respondent and Workers Compensation Fund contend claimant's benefits should be limited to those of a scheduled injury. If claimant has sustained an "unscheduled" injury, the respondent and Fund contend claimant's benefits should be based upon functional impairment only. The issue now before the Appeals Board is the nature and extent of disability. Claimant concedes the respondent is entitled an offset or credit for retirement benefits she is presently receiving in the event she is awarded a work disability under K.S.A. 44-501(h).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The benefits awarded claimant should be modified.

On August 25, 1993, claimant fell and struck her left knee on a metal rod while at work. As a result of that accident, claimant fractured her left patella and underwent an open reduction of the fracture the next day. Claimant was re-operated in January 1994 to remove surgical hardware.

After recovering from her surgeries, claimant returned to work for the respondent on or about March 3, 1994, in an accommodated position. Claimant performed that job for three months until she retired on May 31, 1994, at age 61 or 62. Claimant testified that the accommodated job required her to sit the entire day which caused numbness in her left leg and to her back. Claimant also testified that because of her difficulties sitting and standing she decided to retire.

Claimant contends she is entitled to receive permanent partial disability benefits under K.S.A. 44-510e for an "unscheduled injury" because she alleges she has developed back problems as a result of her knee injury and resultant limp. The respondent and Workers Compensation Fund contend claimant's benefits should be limited to those of a "scheduled injury" under K.S.A. 44-501d.

Respondent presented the testimony of orthopedic surgeon Charles D. Pence, M.D., who treated claimant from August 1993 through September 1994. Dr. Pence first saw

claimant on the day of her accident and on the next day he performed an open reduction internal fixation of the left patella. On January 11, 1994, the doctor re-operated on claimant to remove the surgical hardware that had been utilized in the first surgery. He testified that he found no physical impairment of function to claimant's low back because her complaints did not seem significant enough to pursue. However, he indicated that those complaints were secondary to claimant's problems with walking. He rated claimant as having a 7.5 percent functional impairment to the left lower extremity and believes claimant should avoid climbing stairs or ladders more than two times per hour, avoid activity which requires kneeling, avoid activity which requires squatting longer than two or three minutes at a time or more than six times per hour. Also, he believes claimant should be allowed to sit intermittently at least five minutes of every hour. He agrees with the analysis of respondent's vocational rehabilitation expert, Karen Crist Terrill, that claimant could no longer perform two of nine, or 22 percent, of claimant's former job tasks.

At her attorney's request, claimant saw Ernest R. Schlachter, M.D., on two occasions. Dr. Schlachter diagnosed claimant as having chronic lumbosacral sprain secondary to her altered gait and rated her with a 5 percent whole body functional impairment for the lumbar spine and a 10 percent functional impairment to the left lower extremity which combine for a 9 percent whole body functional impairment according to the AMA Guides. He believes claimant should observe permanent restrictions of limited walking, kneeling, and squatting; perform no lifting more than 30 pounds; should not work in awkward positions; perform only very limited stair climbing, and avoid ladder climbing. Dr. Schlachter advised claimant she could not perform most of her former jobs at respondent's plant and believes she can only work three or four hours per day whatever she does. Based upon his knowledge of claimant's condition and former job tasks, Dr. Schlachter believes claimant can no longer perform 70 percent of the job tasks she has performed over the 15-year period preceding her August 1993 accident.

The respondent also presented the testimony of Kenneth D. Zimmerman, M.D., who works for the respondent in its medical department. Dr. Zimmerman reviewed the entries made in claimant's medical records when she visited the medical department after the August 1993 accident. He testified that respondent returned claimant to work after her surgeries with temporary restrictions of no walking greater than 200 yards at one time, no ladder climbing, no lifting greater than 35 pounds, and that claimant should be sitting 50 percent of the time. The notes from respondent's medical department do not indicate that claimant complained of back symptoms on her visits to respondent's in-house medical personnel. However, the medical note dated May 11, 1994, indicated that claimant reported at that time that she could not tolerate the discomfort she was experiencing from her work and that she intended to retire.

Because of the disparity in the medical opinions, the Administrative Law Judge requested an independent medical examination to be performed by Pedro A. Murati, M.D., who is board eligible in physiatric medicine. Dr. Murati saw claimant on two occasions,

March 23, 1995, and June 16, 1995. Among other findings, Dr. Murati found that claimant had a left antalgic gait, limited range of motion in all planes in her back, and increasing tone along the lumbosacral paraspinal muscles. He diagnosed patella fracture on the left and chronic lumbar strain secondary to the patella fracture. He believes claimant has sustained a 9 percent whole person functional impairment which is comprised of a 9 percent functional impairment to the left leg for the left knee surgery and a 5 percent functional impairment to the left leg for the left antalgic gait. He did not give an impairment of function rating for claimant's back because he felt range of motion studies, which he requested, were invalid and those studies were the only data he had to assess functional impairment. Because of the knee, Dr. Murati believes claimant should be restricted from climbing stairs and ladders; restricted from lifting greater than 30 pounds; and that she should alternate sitting, standing, and walking. Because of her back, the doctor believes claimant should be limited to lifting 30 pounds on an occasional basis; should only occasionally bend, squat, and stoop; and avoid kneeling. Although the sitting restriction is more related to her knee than to her back, Dr. Murati testified that sitting will bother claimant's back and he would advise her against a job that required her to sit the entire day.

During his deposition, Dr. Murati reviewed 10 job tasks that he was asked to assume that claimant performed over the 15-year period preceding claimant's date of the accident. He testified that claimant could not perform the task of making metal parts because it violated her restrictions against stooping, kneeling, and standing. Likewise, he testified claimant could not perform the task of using a ball-peen hammer because it violated the standing restriction and that claimant could not perform the tasks identified as fiberglass lay up, placing materials on tools, working on cowling, and using hand tools because of both her standing and stooping restrictions. However, he did indicate claimant could perform the three tasks of operating a stretcher machine, completing paperwork, and general cleanup.

Regarding her various job tasks, claimant testified that the job tasks identified as making metal parts and forming parts, ball-peen hammer work, operating a stretcher machine, fiberglass lay up, placing material on tools, and working on cowling was performed while standing. Although she also testified that she could probably have performed those same tasks while sitting, if the parts were small enough, before her injury she rarely received parts of the requisite size which would permit her to sit. However, during the three-month period she returned to work for the respondent after her injury, respondent provided her with small parts and required her to sit the entire day. Although she complained to her supervisors that sitting caused her difficulties, she did not return to the medical department to request a change in her restrictions.

At the time of the accident, claimant's average weekly wage was $659.89 which is comprised of $658 per week base wage and $1.89 per week in overtime. The parties stipulated that claimant's average weekly wage was sufficient to qualify for the maximum

weekly benefit under K.S.A. 44-510e. Due to her retirement, claimant is no longer working and receives $485.38 in monthly retirement benefits from the respondent. At oral argument, claimant conceded that the permanent partial disability benefits would be reduced by the weekly equivalent amount of retirement benefits under the provisions of K.S.A. 44-501(h). Converting the monthly retirement benefit to a weekly amount yields an amount of $112.01.

The Administrative Law Judge awarded claimant permanent partial disability benefits for an "unscheduled" injury under K.S.A. 44-510e. That statute reads:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the medical evidence presented, the Appeals Board agrees with the Administrative Law Judge that claimant has sustained impairment to both her left knee and her back as a direct result of the August 1993 accident and, therefore, is entitled to receive permanent partial general disability benefits as provided under K.S.A. 44-510e. However, the Appeals Board disagrees with the Administrative Law Judge that claimant's benefits should be limited to the functional impairment rating because she chose to retire. The Appeals Board finds claimant elected retirement because of difficulties and symptoms arising from the work injury.

The Court of Appeals held in both Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P. 2d 365, rev. denied 251 Kan. 937 (1992), and Lynch v. U.S.D. No. 480, 18 Kan. App. 2d 130, 850 P.2d 271 (1993), that voluntary retirement does not affect permanent partial general disability benefits. Both of these decisions address the issue of permanent partial disability under the preceding version of K.S.A. 44-510e. However, the Appeals Board believes the Appellate Courts would analyze the retirement issue similarly under the present law and reach the same conclusion. The legislature apparently intended such a result when it enacted K.S.A. 44-501(h) in 1993. That statute reduces, in certain cases, a worker's permanent partial disability compensation by the amount of the worker's

retirement benefits to the extent the disability compensation exceeds the amount payable for functional impairment.

As indicated above, K.S.A. 44-510e requires the fact finder to first determine the "percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." Regarding that loss of ability to perform former work tasks, Dr. Pence indicated that he agreed with the analysis of respondent's vocational rehabilitation expert that claimant could no longer perform 22 percent of her former job tasks. On the other hand, both Drs. Schlachter and Murati indicated that claimant could no longer perform 70 percent of the former job tasks. Based upon this evidence, claimant's loss of ability to perform work tasks that were performed over the 15-year period before the August 1993 accident falls somewhere between 22 percent and 70 percent. Based upon the entire record, the Appeals Board is not convinced that either percentage is more correct than the other. Therefore, the Appeals Board finds that claimant's loss of ability to perform work tasks is 46 percent which is the average of the range provided.

In addition to computing percentage of task loss, K.S.A. 44-510e requires the fact finder to determine "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." Because claimant has retired and is no longer earning wages, claimant argues there is a 100 percent difference in those wages. Respondent, on the other hand, contends that claimant's average weekly wage should be imputed. Respondent argues that under these facts the fact finder should compare claimant's average weekly wage with the average weekly wage claimant retains the ability to earn to determine this prong of the disability formula.

Claimant contends the language of K.S.A. 44-510e is clear and that the fact finder should use actual wages rather than the ability to earn wages to determine the percentage of wage loss. Respondent contends that claimant voluntarily left her employment in the labor market and, therefore, the policy pronounced in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), controls and requires the fact finder to impute an average weekly wage.

In Foulk, the Court of Appeals interpreted K.S.A. 1988 Supp. 44-510e and the language that "[t]here shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury." The Foulk Court determined that a worker could not avoid that presumption by refusing to attempt to perform accommodated work which was offered and which paid a comparable wage. In effect, the Court determined that wages would be imputed for purposes of that presumption despite

the statutory language indicating that the worker had to actually work and earn a comparable wage. At page 284 of the Foulk decision, the Court wrote:

> "The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."

Although the Foulk decision addressed the immediate predecessor of the present version of K.S.A. 44-510e, its rationale is compelling and it is presumed that the Appellate Courts would similarly apply it to those claims arising under the present law.

The question of law now before the Appeals Board has not been answered by the Kansas Appellate Courts. For accidents occurring between July 1, 1987, and July 1, 1993, K.S.A. 44-510e provided that permanent partial general disability benefits were determined by considering both **loss of ability** to perform work in the open labor market and **loss of ability** to earn a comparable wage. Before July 1, 1987, the test was **loss of ability** to perform work of the same type and character that the worker was performing at the time of the accident. However, the 1993 Kansas Legislature modified K.S.A. 44-510e to change the method of computing permanent partial general disability benefits. The 1993 legislature made a major shift from considering loss of ability to perform work or earn wages to determining the actual difference in pre- and post-injury earnings. Because of that shift, coupled with the decision of Foulk, the question which has arisen on numerous occasions is when should a worker's loss of ability to earn wages be substituted for the actual difference in pre- and post-injury wages for purposes of the wage differential prong of K.S.A. 44-510e. Should the fact finder use the ability test rather than actual wage difference when a worker refuses, without justification, to attempt an accommodated job? What if there is justification to decline the job offer? What if a worker returns to work and is underemployed? What if the underemployment is intentional? What if an injury prompts the worker to retire? What if the worker retires and the injury played no part in that decision? What if a worker takes early retirement? What if no retirement benefits are payable? A multitude of scenarios exist which raise the same issue.

Although it might be expedient to apply the Foulk rationale to all situations where a worker either refuses an offer of accommodated employment or voluntarily leaves the labor market, to do so would be to substantially deviate from the plain and unambiguous language of the present statute. When a statute is plain and unambiguous, the court must give effect to the legislative intent, as expressed, rather than determine what the law should or should not be. Martindale v. Tenny, 250 Kan. 621, 829 P.2d 561 (1992). Also

the Foulk Court did not address the Brown and Lynch cases, cited above, both of which earlier interpreted the same statute as did Foulk and held that voluntary retirement did not affect permanent partial general disability benefits.

In addition to modifying the definition of permanent partial general disability, the 1993 Kansas Legislature also amended K.S.A. 44-501 to add the following:

> "(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment."

Considering both K.S.A. 44-501 and K.S.A. 44-510e, and their amendments, the Appeals Board finds that the legislature must have intended that actual wage difference be used in the formula to determine permanent partial general disability benefits when a worker retires. As indicated by K.S.A. 44-501(h), retirement benefits can only reduce permanent partial general disability benefits which are in excess of those payable for functional impairment. That language would be a nullity if the fact finder were to impute a worker's wage upon retirement as in many cases the imputed wage would equal or exceed 90 percent of the average weekly wage the worker was earning at the time of the accident and, therefore, preclude recovery of benefits in excess of that payable for the functional impairment rating.

The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained. City of Wichita v. 200 South Broadway, 253 Kan. 434, 855 P.2d 956 (1993). There is a presumption that the legislature does not intend to enact useless or meaningless legislation. State v. Starks, 20 Kan. App. 2d 179, Syl. ¶ 6, 885 P.2d 387 (1994).

Further, because Brown was decided in 1992 and Lynch was decided in March 1993, the 1993 Kansas Legislature was presumably aware of both decisions and the Court's holding that retirement did not affect a worker's right to receive permanent partial general disability benefits. Therefore, it is arguable the legislature was satisfied with the results of those decisions and desired to modify the law only slightly to provide a credit for certain retirement benefits as it did in its amendments to K.S.A. 44-501. Arguably, if the legislature had intended that retired workers disability be computed by considering

one's ability to earn wages rather than the actual difference in pre- and post-injury wages, the legislature could have easily so provided.

Based upon the above, the Appeals Board finds that the difference between the pre-injury and post-injury average weekly wage is 100 percent. As required by K.S.A. 44-510e, the 46 percent task loss is averaged with the 100 percent wage difference to produce a 73 percent permanent partial general disability which is subject to the reduction for retirement benefits, as indicated above, for the period commencing June 1, 1994. For the period from March 3, 1994, through May 31, 1994, when claimant was working for the respondent, claimant is entitled to receive permanent partial disability benefits based upon the 9 percent whole body functional impairment rating as found by Dr. Murati. That is because under K.S.A. 44-510e a worker is not entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the worker engages in any work for wages equal to 90 percent or more of the average gross weekly wage that the worker was earning at the time of the injury.

The evidence fails to establish a preexisting functional impairment to be deducted from claimant's disability as contemplated by K.S.A. 44-501(c). Although claimant did see a chiropractor for back complaints in approximately 1990, the symptoms resolved and claimant did not miss any work as a result of those complaints. Claimant was neither given a functional impairment rating nor work restrictions for that condition. In addition, the record is devoid of evidence to establish that claimant's back impaired claimant in any manner before the August 1993 accident. Based upon the entire record, the Appeals Board finds claimant was not impaired before the August 1993 accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant, Jewell J. McKinney is entitled to an award of benefits against the respondent, The Boeing Co.-Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained on August 25, 1993, and based upon an average weekly wage of $659.89. Claimant is entitled to receive 27 weeks of temporary total disability compensation at the rate of $313 per week, or $8,451, followed by 12.86 weeks of permanent partial general disability benefits at $313 per week or $4,025.18, for a 9% whole body functional impairment for the period March 3, 1994, through May 31, 1994; followed by 281.33 weeks of permanent partial general disability benefits at $313 per week less a weekly reduction of $112.01 for retirement benefits, or $56,544.52, for a 73% work disability for the period commencing June 1, 1994, for a total award of $69,020.70.

As of September 13, 1996, there is due and owing claimant 27 weeks of temporary total disability benefits at the rate of $313 per week, or $8,451, followed by 12.86 weeks of permanent partial general disability benefits at $313 per week or, $4,025.18, followed

by 119.43 weeks of permanent partial general disability benefits at $200.99 per week, or $24,004.24, for a total due and owing of $36,480.42, which is ordered paid in one lump sum less amounts previously paid. The remaining balance of $32,540.28 is to be paid for 161.90 weeks at the rate of $200.99 per week, until fully paid or further order of the Director.

Pursuant to stipulation, the Workers Compensation Fund is ordered to pay one-half of the costs and benefits associated with this Award.

The remaining orders entered by the Administrative Law Judge in the Award dated February 26, 1996, are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Vaughn Burkholder, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director